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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 55

ALBERT W. HAMILTON, a Minor, by ALBERT HAMILTON, His Guardian ad Litem, et al.,

Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

REPLY BRIEF OF APPELLANTS.

John Beardsley,
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By permission of the Court appellants respectfully submit this brief statement in reply to the brief of Professor Sveinbjorn Johnson, of the University of Illinois, as *amicus curiæ*.

Professor Johnson states his thesis on page 2 of his brief as follows: "The appended brief is submitted in support of * * * the legal proposition that it was the intent and purpose of Congress, when the Land Grant Act of July 2, 1862, was enacted, that the beneficiary institutions main-

tain a reasonable number of compulsory courses of instruction in military tactics."

The professor does not, other than incidentally, attack the main argument of appellants that: (a) compulsory military training is a violation of the guaranty of religious freedom as expressed in the 1st Amendment, and as made applicable to State statutes by the due process clause of the 14th Amendment; (b) that a land grant college may not impose as a price for education the surrender of rights and privileges or immunities belonging to Appellants as citizens of the United States under the Constitution and laws of the United States.

If the Court should hold with Professor Johnson, our "privileges and immunities" argument would fall. Such a holding, however, would not affect our religious freedom argument.

Going directly to the kernel of the matter, we submit that the opinion of Attorney-General Mitchell, rendered to the Department of the Interior on June 20, 1930 (36 Opinions of Attorney-General 297), completely disposes of the argument that Congress intended that courses in military training at the land grant colleges should be compulsory. The Attorney-General states the question as "whether agricultural colleges having grants under the Act of July 2, 1862, c. 130, 12 Stat. 503, and amendatory Acts, are required to include military tactics among the compulsory courses of study or whether they may simply offer this subject as an elective course." He reviews the history of that statute and its amendments, and says: "The association of the words 'military tactics' in the statute with the words 'such branches of learning as are related to agriculture and the mechanic arts' shows that there was no intention to require instruction in military tactics to be compulsory upon the students any more than those branches of learning related

to agriculture and mechanic arts. If one branch is compulsory, all must be, and when we consider the great variety of branches which are related to agriculture and mechanic arts under the modern educational system, it is apparent that it would be impracticable to require any student to take all such courses. It is generally recognized that there is no obligation on agricultural colleges having land grants under the Act of July 2, 1862, to compel their students to take any course related to agriculture or mechanic arts."

Further on, the Attorney-General says: "I have also considered what was done after the passage of the Act of 1862. From a memorandum submitted to me it appears that in several of the States, at least, courses in military tactics were compulsory in the years immediately following the passage of the Act. But in a letter to the Secretary of War, under date of July 19, 1923, the Acting Secretary of the Interior informed the Secretary of War that—

> "'the policy of the Department of the Interior has been that a State fulfills its obligation under the law when it offers instruction and provides facilities for instruction in the branches of learning specified in the land-grant college legislation.'"

Mr. Mitchell then points out that "the problem has in particular been presented with respect to the State of Wisconsin since 1923, for in that year the legislature of that State provided by statute that the study of military training at the State University should be optional"; and "that in 1926 Congress, in amending the Act of July 2, 1862, reenacted the precise language of the Act of July 2, 1862" (language requiring that military tactics be taught); reenforcing that point with citations to cases in which this Court has held that the reenactment of a statute while an administrative interpretation of the statute is in effect—"amounts to an implied legislative recognition and approval of the executive construction of the statute."

Concluding, the Attorney-General says:

> "I am of the opinion that the construction of the statute adopted by your Department is a reasonable one, and that it was in effect approved by Congress by the reenactment of the language in question after the adoption and publication of that construction by your Department. Added force is given to the reenactment of this language by the fact that it occurred after the legislation in Wisconsin referred to above.
>
> "I, therefore, advise you that you are justified in considering that an agricultural college which offers a proper, substantial course in military tactics complies sufficiently with the requirements as to military tactics in the Act of July 2, 1862, and the other Acts above mentioned, even though the students at that institution are not compelled to take that course."

Professor Johnson, as *amicus curiæ,* devotes many pages of his brief to quotations from college administrators, private individuals, and unofficial organizations, all to the effect that those individuals held and expressed opinions differing from the opinion of Attorney-General Mitchell and from the practice of the Department of the Interior and the Department of War.

On page 24 of his brief, Professor Johnson says: "It (the War Department) has always taken the position that it was obligatory not only to require all able-bodied male students, not excused for cause, to pursue a course of study in military education and training, but that the requirements of the law in this behalf were not met by perfunctory or merely colorable compliance with the letter of the act. It was in response to a letter in which the position was taken by the War Department that training was compulsory that the Interior Department stated its policy." That language constitutes a rather clarifying admission by the Professor. Under the law, the Department of the Interior is the department to which is committed the responsibility

for dealings between the Federal Government and the land grant colleges. The Department of the Interior, presumably by advice of its solicitors, held that the colleges complied with the requirements of the statutes by affording courses and that there was no requirement that such courses be compulsory upon the students, and the Department of the Interior is the department which provides the certification of colleges which enables them to receive the financial support of the Government. Thus, on the administrative side, historically the appropriate department of the Government has taken and adhered to its very definite position.

It is true that in many instances, army officers have expressed the opinion that compulsory military training was required, but even that fact has little or no significance when we remind ourselves that on November 18, 1924, Secretary of War, John W. Weeks, wrote a letter to Walter C. Longstreth, of Philadelphia, a photostatic copy of which letter counsel for appellants exhibited in court in connection with his oral argument, and which letter is as follows:

"Mr. Walter C. Longstreth,
1218 Chestnut Street,
Philadelphia, Pa.

"DEAR SIR:

"Receipt is acknowledged of your letter of November 14, 1924, relative to the procedure necessary for an educational institution maintaining a unit of the Reserve Officers' Training Corps to change the status of its military training course from compulsory to elective.

"I am pleased to inform you that the National Defense Act does not make military training compulsory at any of the institutions which receive the benefits authorized by the Act.

"So far as the War Department is concerned it is optional with the authorities of the school, college or university whether military training shall be an elec-

tive or a compulsory course in the curriculum. However, a certain class of colleges, known as land-grant institutions must fulfill conditions specified in the Act of July 2, 1862, before they can receive the benefits granted by that act. The National Defense Act does not change or amend those conditions.

"I would suggest that you refer your query regarding the land-grant institutions to the Department of the Interior which is charged with the administration of the Act of July 2, 1862.

"For your information I am inclosing a copy of the form of application for the establishment of R. O. T. C. units.

"Your very truly,
(Signed) "JOHN W. WEEKS,
Secretary of War."

So we find upon examination that neither the Department of the Interior nor the Department of War has officially construed the requirement of military training as a requirement of compulsory training. Further than that, many of the land grant colleges themselves, including several of those represented by Professor Johnson in his brief, have manifested the perfectly clear understanding that the Federal statute does not require compulsory military training. For example, counsel for the Appellees, in his oral argument in this case, urged the point that students who were opposed to military training at the University of California might very easily escape it by taking the equivalent of freshman and sophomore years at one of the 37 junior colleges maintained by the State.

Mr. Johnson himself refutes his own historical argument fairly ably by pointing out that in 1879-80 the Ohio State legislature placed military training at Ohio State University, a land grant college (pp. 36-37) upon an optional basis; that Kansas State College in 1868 exempted certain students from military training (pp. 39-40); that in the charter of the Oklahoma Agricultural and Mechani-

cal College "the requirement to teach military tactics was not specifically mentioned" (p. 41); that certain exemptions were granted in 1889-90 at the Georgia State College of Agriculture (p. 39); that Pennsylvania State College in 1865 exempted students with conscientious scruples (p. 41).

There is no suggestion that any of those land grant colleges suffered a diminution of the support by the Federal Government because of their failure to make military training compulsory as to all students. And as pointed out in the oral argument, the State of Minnesota, within the last six or eight months has made military training optional and has suffered no reduction of its Federal support. Incidentally, the University of Minnesota is one of the land grant colleges on whose behalf Professor Johnson submitted his brief. Other colleges included in that group, including the University of Arizona, Rhode Island State College, the University of Maryland, Kansas State College, Michigan State College, and the University of Arkansas, we are advised have exempted conscientious objectors to military courses or at least indicated the possibility that such students might be exempted.

Finally, we respectfully submit that Professor Johnson has not only failed to establish his thesis that the land grant college Act requires that courses in military tactics shall be compulsory upon students, but that he has gone beyond the requirements of his employment by a number of colleges and has aided materially in establishing the sound proposition of law that the land grant college Act *does not* make any such requirement. Therefore, we urge our argument that since the Federal statutes do not require compulsory military training in the Reserve Officers' Training Corps, which is an integral part of the Federal military establishment, and since obviously no other power than Congress could conceivably require peace-time service in any branch of the Federal military establishment,

maintained for Federal purposes, that freedom from enforced service is a privilege and immunity of Appellants as citizens of the United States which would be abridged by their being compelled so to serve in time of peace, in violation of the privileges and immunities clause of the 14th Amendment.

And although Appellants are not now serving in the Reserve Officers' Training Corps and thus suffering that abridgement of their privileges and immunities as citizens, they having been suspended from the University for their refusal thus to serve, it is perfectly clear that no State may, by legislative enactment, by constitutional provision, or by a rule of the Regents, whether or not such a rule be termed a statute, impose as a price for the education which it may accord or withhold in its discretion, the surrender of rights or privileges or immunities accruing to Appellants as citizens of the United States by virtue of the Constitution and laws of the United States. In our opening brief and in our oral argument we have cited the appropriate authorities in the support of that proposition.

And may we remind the Court that we have made no attempt in this brief to renew our argument that it is a violation of the guaranty of freedom of religion to compel two devoted young followers of the teachings of Jesus to surrender their deepest convictions of religion and conscience, or, for their refusal, to deny them education at the hands of their State University to which they are in all other respects conclusively shown to be entitled.

Respectfully submitted,

JOHN BEARDSLEY,
Attorney for Appellants.

Washington, October 20, 1934.